93-1092

Supreme Court, U.S.
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No._____

In The
SUPREME COURT OF THE UNITED STATES
October term, 1993

E.Don Smith pro se, Eileen Smith pro se
Petitioners

v.

Zoning Board of Appeals of the
Town of Greenwich
of the State of Connecticut et al.
Respondents

Petition for a Writ of
Certiorari to the
United States Supreme Court

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court entered in this proceeding on August 10, 1993. (14632) (14633)

E. Don Smith & Eileen Smith
pro ses, Petitioners
35 Strickland Rd. Cos Cob,
Connecticut, 06807
(203) 661-2883

January 5, 1994

QUESTIONS PRESENTED

1. Whether there has beem a violation of the Due Process clause when a subdivision of land that meets all written regulations is denied for the vague standards of "public health and safety" just because it is located withir a residential Historic District?

2. Whether there has been a violation of civil rights and equal protection under the law when the written state statutes and local subdivision regulations are applied differently
a) within the same zone and
b) between identical R-7 zones?

3. Whether there has been a taking without just compensation when a free throw(1) building lot has been confiscated for public open space and the ZBA chairmam acknowleges that no alternative would be acceptable to them?

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(1) **Proof of this "free throw"** Ability was confirmed by the Director of Planning and Zoning within the Preliminary Approval of this Subdivision Application 1017-C dated April 21, 1987. (See Appendix 96A)

LIST OF ALL PARTIES TO THE PROCEEDING

The parties in the proceeding before the Supreme Court are as follows:

Plaintiffs-Appellants-Petitioners

1. E.Don Smith, Eileen Smith pro ses

Defendants-Appellees-Respondents

1. Planning and Zoning Board of Appeals of the Town of Greenwich, Connecticut

2. Greenwich Historical Society of the ~~Town of Greenwich, Connecticut~~ Additional Defendant-Appellee

3. Anita De Lessups Keefe Additional Defendant-Appellee

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This case represents a **conflict between the Connecticut Appellate Court and the Connecticut Supreme Court** on an important question of the **interpretation of standards** to be used regarding **property rights** and **historic preservation** which would be applicable throughout the United States of America.

REASON II.....14

This case represents a ruling that **departs from the accepted and usual course** of proceedings. The Connecticut Supreme Court could not find any state statute or local ordinance which prohibited subdivision within an Historic District. So they used the **vague extrapolation** of "public health and safety" as a standard.

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Furthermore, within this case, a state court has ruled **inappropriately** on the **Constitutional** issue of **Due Process, equal protection** under the law, and **taking** without just compensation.

This issue should be settled by the U.S. Supreme Court: **Can the property owners within an Historic District be treated differently from one another and from other comparable zones, without 1) written statutes and ordinances that specifically obstruct sub divisions and 2) without prior notice?**

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OPINIONS BELOW

The opinion of the **Connecticut Supreme Court** is reported in E.DON SMITH ET.AL, v. ZONING BOARD OF APPAEALS OF THE TOWN OF GREENWICH ET AL. (14632 & 14633) 227 Conn. 71 and a copy of the opinion appears in the Appendix p. 1a.

Also a copy of the **AMICUS CURIAE BRIEF** OF PLANNING AND ZONING LAW SECTION OF THE **CONNECTICUT BAR ASSOCIATION** appears in the Appendix p.32a

The opinion of the **Connecticut Appellate Court** is reported in E.DON SMITH ET AL. v ZONING BOARD OF

APPEALS OF THE TOWN OF GREENWICH (10431) 29 Conn. App.28. Appendix p.53a.

The opinion of the **Connecticut Superior Court** is presented in a Memorandum of Decision: E.DON SMITH AND EILEEN SMITH v ZONING BOARD OF APPEALS OF THE TOWN OF GREENWICH D.N. CV89 0101333 S April 10, 1991 Appendix p.68a.

Zoning Board of Appeals Town of Greenwich (Appeal No. 7400-continuation) denial of the subdivision application 1066 of E.Don and Eileen Smith for 35 Strickland Road, Cos Cob. Connecticut was dated May 15 1989. Appendix p.90a.

Planning and Zoning Town of Greenwich **denial** of Subdivision Application No. 1066 of E.Don and Eileen Smith was dated December 8, 1988 Appendix p.94a.

Planning and Zoning of the Town of Greenwich **Preliminary Approval** of Subdivision Application 1017-C E.Don and Eileen Smith was dated April 21, 1987. Appendix P.96a

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on August 10, 1993. The petitioners requested an extension of time to submit a writ of certiorari on October 27, 1993.

The extension of time was granted on November 18, 1993 by Justice Thomas, making the due date January 7, 1994.

This petition for certiorari was filed within the sixty day extension.

The Court's jurisdiction is invoked under **28 U.S.C.S 1257.**

CONSTITUTIONAL PROVISIONS, STATUTES, AND ADMINISTRATIVE POLICIES INVOLVED:

42 U.S.C.S. 1983
Every person who, under color of any statute, ordinance, regulation, custom, or usage of an State or Territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

U.S. Const. Amend XIV:
Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. Const. Amend. V:
...nor be deprived of life,liberty, or property without due process of law;
...nor shall private property be taken for public use, without just compensation.

Conn. Constitution Article 1,
Sec. 8: "No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law."
Sec. 11: "The property of no person shall be taken for public use without

just compensation therefor."
Sec. 1, 12. Amemdment 17.

Town of Greenwich Town Charter
Sec. 101 (d) provides that "the regulations shall provide that the land to be subdivided shall be of such character that it can be used for building purposes without danger to **health or the public safety,** that proper rovision shall be made for water, drainage and sewerage..."

STATEMENT OF THE CASE

1. The Plaintiffs, E.Don Smith and Eileen Smith reside at and are owners of 35 Strickland Road, of the Mill Pond Historic District of Greenwich Conn.

2. On or about January 15, 1987, the Plaintiffs submitted a subdivision application to the Planning and Zoning Commission of the Town of Greenwich to subdivide the premises into three legal lots. The Plaintiff's property contained 33,032 sq.ft. zoned, R-7, single family lots of 7,500 sq.ft. This proposal, through its design left 14.67 % of land as open space.

3. On April 21, 1987, The Commission conducted a hearing on the Plaintiffs' Subdivision application and granted Preliminary Approval, subject to 14 Specific conditions (6 relating to a house) and directed them to prepare a Final Sub-Division Plan.

Within the Preliminary Approval, it was confirmed that, relative to the front building lot (lot 1): "...the **gross area includes a free-throw lot".**

During this period of approximately 6 months, there was never any discussion

regarding: environmental issues, public health and safety concerns, or any objection to constructing a house on the front building lot.

4. On November 22, 1988, the Plaintiff's Final Subdivision plan was denied by the P&Z Board.

(a) The Commission based its denial on the conclusion that the subdivision plan would permit construction of a house adjacent to Strickland Road, "THEREBY DISRUPTING AN ESSENTIAL CHARACTERISTIC OF THE HISTORIC DISTRICT."

(b) The Commission further stated the Sub-division did not conform to the "Town Plan of Development" in that it did not preserve Historic Resources. (**Yet within the Greenwich Municipal code Section 98 it states that a Sub division application cannot be denied because of reasons relating to the Town Plan**).

5. The Plaintiffs thereafter appealed the decision of the commission to the Defendant, Planning and Zoning Board of Appeals (ZBA) of the Town of Greenwich. On April 19 and May 3, 1989, Pursuant to Section 103 of the Greenwich Municipal Code, The Zoning Board conducted DE NOVO Public Hearings on the Plaintiff's Final Subdivision Plan and denied the appeal. The reasons were:

(a) Property is located in the Historic District thus bringing into play Article 5 of the Greenwich Municipal Code (Description of properties within the Historic District).

(b) The Sub-division did not meet the Sub-division regulations "Section 6-260" because it did not conform to the Town Plan of

Development's objective of preserving historic resources, ie, the streetscape.

(c) The plan would have an adverse impact on coastal resources.

6. On October 22, 1990, in the Connecticut Superior Court in Stamford, The Plaintiff's appealed the decision of the Greenwich ZBA. On April 9, 1991, The Trial Court issued a Memorandum of Decision stating that the Plaintiffs' position is without merit regarding sub-division denial because:

(a) The board did apply Standards contained in the Sub-Division Regulations.

(b) Historic Streetscape would be changed by sub-dividing the property into three lots and building on Lot #1.

(c) The ZBA'S decision, based on "Historic Considerations" was proper.

(d) The Plaintiffs' had notice that historic factors would be considered. It is interesting to observe that in 1987-88, while the Plaintiffs were struggling with all these agencies for a small lot and small house, approximately 100 ft from the Plaintiffs property **the Historic Society was completing their new building.** The Defendants are always arguing that you cannot see it from the street but pictures showing that it is visible were included within the Record.

7. On May 1, 1992, plaintiffs appealed to the Appellate Court. On September 8, 1992, the Appellate Court reversed the judgment of the trial court, concluding that the Board did not have the authority to consider historical factors in deciding whether to grant or deny a subdivision application because:

(a) the enabling statutes on

subdivisions did not give the board the authority to include historical factors in its regulations;

(b) the terms 'town plan of development', 'historic factors', and 'historic streetscape' are not known and fixed standards required for subdivision regulations;

(c) the Greenwich town charter forbids the board from denying a subdivision application based on the plan of development; and

(d) it is the duty of the historic district commission, not the planning and zoning commission or the board of appeals, to decide whether a building should be erected in a historic district".

8. On April 28, 1993, the town of Greenwich and the historical society appealed to the Conn. Supreme court.

9. On May 10, 1993, the **Conn. Supreme Court** formally requested that the **Connecticut Bar Association** file an **Amicus Curiae Brief** to advise them on the issues of land use, planning and zoning authority, and historic preservation. On June 9, 1993, the **Connecticut Bar Association** submitted the requested **Amicus Curiae brief** which **completely supported the Appellate Court decision** in all aspects:

"A PLANNING AND ZONING COMMISSION MAY NOT DENY A SUBDIVISION APPLICATION ON THE BASIS THAT THE PROPERTY IS LOCATED IN AN HISTORIC DISTRICT AND THAT THE DEVELOPMENT OF THE PROPERTY MAY BE INCONSISTENT WITH THE HISTORIC PRESERVATION OF THE DISTRICT.

(a) The Powers Of An Administrative Land Use Agency Are Strictly Proscribed By The Parameters Of Its Enabling Legislation Be It By

Special Act Or Pursuant To Connecticut General Statutes.

(b) Assuming, Arguendo, That Defendant Was Authorized By Its Charter To Promulgate Regulations Allowing Denial Of A Subdivision For Its Impact On Historic Preservation Goals, Defendant's Regulations Did Not Contain Known And Fixed Historical Review Standards To Guide It

(c) Defendant's Reliance On The Plan Of Development As A Source Of Authority To Consider Historical Factors Is Misplaced.

(d) The Regulations Use The Words Historic Or Historical In Only Two Provisions And These Provisions Are Not Relevant To This Application.

10. On August 10, 1993, the Connecticut Supreme Court reversed the appellate court decision stating:

(a) the charter provision giving the commission the power to protect "public health and safety" includes the power to protec the environment, which in turn includes historic preservation.

(b) the commission being authorized to consider historical factors under the subdivision regulation that permits the commission in its discretion to require an environmental assessment.

(c) the regulations here sufficiently apprised the plaintiffs of the factors that would be considered in evaluating their application.

(d) CGS 7-147 authorizes a historic district commission to cooperate with other regulatory agencies inerested in preservation, and the statutes do not confer exclusive powers on a historic district commission.

(e) the record did not indicate any conflict between the pertinent subdivision regulations and the applicable zoning regulations.

(f) the plaintiffs failed to sustain their burden of proving that there were no other viable options for the property.

FEDERAL QUESTIONS RAISED

Petitioners raised the Constitutional issues of Due process, property rights, equal protection under the law, civil rights and taking without just compensation at ZBA and at all three levels of state judicial review.

ZONING BOARD OF APPEALS:
Petitioners claimed a taking (Superior Court Memo of decision, 4/10/91, p.11)
Response by ZBA: The Board rejected this claim arguing alternatives.
SUPERIOR COURT: #CV-89-0101333-S
Petitioners' Brief: Issues (p.1)
"18-C Can planning and Zoning Commission ignore the Constitutional Rights and take a citizen's property without due process of law? Arguments under 18-C
Taking of property (p.11)
Civil Rights Act (p.12)
Constitutional Amendments: 5, 14 (p.15).
Response by Superior Court dated 4/10/91
"The Board rejected this claim (taking) concluding that because other alternatives for development of the property exist, the plaintiffs were not deprived of their development rights. (p.11) There was no response regarding discrimination charge even though another structure was built concurrently to this application.
APPELLATE COURT: No. A.C.10431
Petitioners' Brief dated 10/9/91

Issues (p.ii)
III. "Did the trial Court fail to recognize that this subdivision denial was a violation of Constitional Rights:
A. It was a taking without due process and just compensation.
B. It was a deprivation of Civil Rights with prejudice.
Summary of Argument III (p.5)
Detailed Arguments of III above:
Taking/due process (p.20-24)
Civil rights (p.26)
Response by the Appellate Court:
The Court reversed the trial court's decision and upheld the petitioners' rights.
SUPREME COURT 14632, 14633 8/10/93
Petitioners'Brief:
Statement of Aggrievement (p.1)
"The Appellees are aggrieved in that their property was taken without due process of the law and in violation of the 5th and 14th Amendments of the US Constitution, and in violation of Article 1, sections 1,8, 11, 12, and amendment 17 of the Constitution of the State of Connecticut."
Summary of the Argument
I. F. The Uniformity Clause of CGS 8-2 and the Civil Rights Act of 1871 prevents discriminatory treatment of owners... "(p.4)
II. F. A taking without just compensation will occur if the Appellate Court decision is overturned because a 100% confiscation of a free cut property has occurred." (p.4)
Arguments: Due Process (p.9) Civil rights (p.11-13) Taking (p.24-29)
Response by Ct. Supreme Court: 8/10/93
"The plaintiffs could not prevail on their claim that the decision of the Appellate Court could be upheld on the

ground that the denial of their subdivision application constituted an unconstitutional taking of their property without just compensation, they having failed to sustain their burden of proving that there were no other viable options for the property." (p.4) The Conn. Supreme Court failed to analyze the charge of discrimination and violation of Civil Rights, despite the fact that the neighbor Historic Society was allowed to build concurrently with the Petitioners denial.

REASONS WHY THIS CASE SHOULD BE HEARD

INTRODUCTION

The issue in this case has an impact on all of America. Historic preservation is a worthwhile goal but the use of arbitrary discrimination will not promote the growth of Historic areas, rather, it will cause a decline.

In Connecticut alone, there are 6,200 families who have already agreed to allow their property to be part of the 99 Historic Districts. They are under the conception that the only restriction upon them is the compliance with the "Certificate of Appropriateness procedure," ie, all changes must be of a congruent design.

If this decision is allowed to stand, then all property owners within Historic Districts across America will be subjected to unlimited police power because the authority of Planning and Zoning Boards and Historic District Commissions will be omnipotent and unpredictable.

The result will be the end of preservation as we know it because no citizen would be willing to forfeit their right to property, due process, and equal protection under the law.

Even greater effect may be felt nationwide. If a state's highest court is allowed to utilize such a broad standard as the "protection of public health and safety", **law will be diluted.** If written rules are not applied and adhered to, and if commissions can exceed their authority, there will be chaos in land development.

There are three major reasons why the Supreme Court should hear this case.

REASON I:

This case represents a **conflict between the Connecticut Appellate Court and the Connecticut Supreme Court** on an important question of the **interpretation of standards** to be used regarding **property rights** and **historic preservation** which would be applicable throughout the United States of America.

The Appellate Court unanimously upheld the petitioners' right to subdivide, stating that the Zoning Board of Appeals had no authority to consider historic factors because "historic" is outside the enabling statute.

Even the defendants' attorney admitted, during oral argument, that if the subject property was not located in an historic district, but in another R-7 zone, the application would have been approved. This acknowledged fact by the opposition confirms that there was a lack of due process. "...statutory discrimination between two like classes

cannot be rationalized by assigning different labels to them..." Richardson v Belcher (1971) 404 US 78.

The case was appealed to the State Supreme Court, who requested that the **Connecticut Bar Association** (CBA) submit an **Amicus Curae brief** to clarify the issue. The three CBA attorneys involved unanimously supported the Appellate Court and the petitioners: "**The powers of an administrative land use agency are strictly proscribed by the parameters of its enabling legislation be it by special act or pursuant to Connecticut General Statutes**" (page 1) (Appendix p.

Despite the above objective and concrete input, the Supreme Court unanimously overturned the Appellate Court decision stating: "ZBA has the right to consider historic factors in deciding subdivisions because their Town Charter allows them to protect public health and safety, which includes protecting the environment, which in turn includes historic preservation." Connecticut Law Journal 8/10/93, page 4.

This is a contradiction of past Conn. Supreme Court decisions. "Public health and safety" has been discredited in 1990. "Policy statements gleaned from subdivision regulations regarding compliance with public health and safety regulations **do not provide a sufficient basis for rejection** of a subdivision permit. " TLC Development, Inc. v P & Z Comm. (1990) 577 A.2d 288, as quoted by the Appellate Court Memorandum of Decision page 38.

In regard to the effect of this proposal on the environment, the trial court decided that "it **would not** have an adverse impact on coastal resources because of the alteration of natural

features of vistas." (Superior Ct.p.20.)

The environmental protection act (sec.22a-1a) does not control subdivisions, (CBA Amicus Curiae Brief page 6), therefore, it is impractical for any ZBA to enforce such an application of an unrelated statute.

For the Ct. Supreme Court to say that the construction of a house in a residential neighborhood would be detrimental to health and safety is a clearly erroneous deduction---especially since new construction occurred within 100 feet. This decision is in violation of: 1) state constitution and statutary rules; and 2) petitioners' statutory and constitutional rights.

IMPACT of Not Reversing the Opinion:

To allow this decision to stand, is to surrender **principled decision-making** by courts and by administrative agencies. Instead of examining the state enabling acts and the local regulations, and basing their interpretation on the **standards of legal doctrine**, they will be making decisions by arbitrary preference.

Planning and zoning boards will become **independently omnipotent**, and citizens will lose all their property rights despite the 5th and 14th Amendments.

REASON II.

This case represents a ruling that **departs from the accepted and usual course** of proceedings. The Conn.Supreme Court could not find any state statute or local ordinance which prohibited subdivision within an Historic District. So the following **vague extrapolation** of a standard was made: "Accordingly, we conclude that because the phrase '**public**

health and safety' includes **environmental** factors, it includes **historical** factors."

ARGUMENT A: Loose linkage of interpretation. (No standards)
The Supreme Court's statement contains three unrelated assumptions. One, that the expression public health and safety always includes environmental factors and two, that environmental factors automatically includes historical factors. The third assumption is that a legal subdivision will endanger public health and safety.

The following argument is quoted from the Conn. Bar Association Amicus Curiae Brief, p.5 (See Appendix 32a) According to Websters Collegiate Dictionary, "**Health**" describes the condition of being sound in body, mind or spirit, especially to be free from physical disease and pain. It does not connote historical concerns. "**Safety**" is the condition of being safe from undergoing or causing hurt, injury or loss. Both of these words relate to whether the subdivision property is physically "**buildable**" and not to whether it will impact more esoteric and subjective sensibilities dealing with aesthetic or historic concerns outside of the subdivision. Nothing in the Town Charter ever mentions or implies in any way that historical concerns are meant to be considered in determining whether building on a particular piece of land is **dangerous. The enabling language necessary for the Commission to create regulations allowing it to decide subdivisions on their historical impact is simply not to be found within the Town Charter."**

Public health and safety have

nothing to do with historical preservation. To use this irrational association is an obstruction of due process. "Guarantee of due process demands only that law shall not be unreasonable, arbitrary or capricious, and that means selected shall have **real and substantial relation** to object sought to be obtained." Nebbis v NY (1934) 291 US 502.

"Discriminations are not to be supported by mere fanciful conjecture, and cannot stand as reasonable if they offend plain standards of common sense. Hartford Steam Boiler Inspections & Ins. v. Harrison (1937) 301 US 459.

An example of fanciful conjecture is seen in this quote from the Conn. Supreme Court: "These statutes **illuminate** the statutory phrase before us in this case because they address **generally related subjects** that the legislature **may** have **presumed** to have **considered**..." CT. Law Journal 8/10/93 page 16. (emphasis added). Such a conjecture is clearly erroneous and goes beyond what is a reasonable deduction.

ARGUMENT B: This ruling is not clearly established.

The U.S. Supreme Court has clarified Statutory legislation: "...it is only essential, so that it may not constitute denial of due process of law or of equal protection of law and that there shall be some **rational connection** between fact proved and ultimate fact presumed and that **inference** of one fact from proof on another shall not be so **unreasonable** as to be a purely **arbitrary** mandate..." Mobile, J. & K.C.R. Co. v Turnipseed (1910) 219 US 35. (emphasis added) To infer that any house would

endanger public health and safety is a wholly arbitrary conclusion, especially since new construction was allowed simultaneously.

The ruling under review, implies that ANY subdivision within an historic district would be prohibited even before the house location and design were even planned. Yet CGS 7-147 (a-k) allows for a certificate of appropriateness procedure to review structural design, proving that building will be allowed if congruent. To deny a legal subdivision on the grounds of public health and safety not only violates the statutory authority of CGS 7-147, but also violates Petitioners' statutory property rights to use their land just like their neighbors.

"Statute will not be declared void for **vagueness** and uncertainty where it employs words commonly used, previously **judicially defined,** or have settled meaning in law." Interest of Broods, (1980) 618 P2d 814. There are no standards defining "public health and safety" regarding Historic factors.

ARGUMENT C: Rules that DO NOT effect subdivisions should not be used for denial.

"...equal protection clause **denies** to states power to legislate that different treatment be accorded to persons placed by statute into different classes on basis of **criteria wholly unrelated to objective** of that statute." Reed v Reed (1971) 404 US 71. Public health and safety is not a standardized, measureable component of the subdivision regulations.

"Selective application of regulation to particular class **denies**

equal protection of laws if it rests on grounds **wholly irrelevant** to achievement of regulation's objectives." Kotch v Board of River Port Pilot Comrs. (1947) 330 US 552.

Lucas v S. Carolina Coastal Council (1992) 112 SCt.2886: "Denied the Court the ability to apply '**harmful or noxious uses' principle** to deny a land owner the ability to build. Similarly, this Court should deny the defendents the ability to use '**danger to public health and safety**' as a reason to prevent petitioners from subdividing.

How can the construction of a house on property that meets the sub-division rules within a zoned residential neighborhood be construed as detrimental to the public health and safety? Furthermore, how could it damage the environment if it met all the building codes? What does health, safety and the environment have to do with Historic factors?

ARGUMENT D: This new rule conflicts with previous decisions and rules made by the same Court.

Using "public health and safety" to deny a **legal** subdivision is a totally **arbitrary** application of vague, questionable bridges. It is in direct contradiction to previous Conn. Supreme Court decisions which held that:

1. Standards must be specific: "Subdivision regulations, in order to be legally valid, must: a) set forth 'known and fixed standards' and, b) conform to the principle that a regulation...cannot be too general in its terms." Sonn v Bristol Planning Comm. 172 Conn. 156.

The US Supreme Court concurred:

"The test of a permissible subdivision regulation is whether the criteria contained in the regulation are as reasonably precise as subject matter requires and are reasonably adequate and sufficient to guide city planning commission and to enable those affected to know their rights and obligations.: American Power & Light Co. v. Securities & Exchange Comm. 329 US 90.

2. Subdivisions which comply with ordinances must be granted:

The Conn. Supreme Court has repeatedly upheld that ZBA has no option but to approve a subdivision that meets the written regulations.

Allied Plywood Inc. v P & Z S. Windsor 2 Conn App. 506

Beach v. Town of Milford 141 Conn. 79

Robt. Reed v P & Z Comm. Town of Chester 208 Conn. 431

R.K.Developm't Co v Norwalk 156 Conn 369

The current case is an example of a Type II Due Process case because "...the legislature has changed its general system of jurisprudence by abolishing what had been previously considered necessary to the proper administration of justice, (and) the protection of the individual..." Kauper, Paul G.,and Beytagh, Franc, Constitutional Law, Little Brown & Co: Boston 1980, p. 704.

Both the Appellate Court and the CBA Amicus Curiae Brief strongly proclaimed that written regulations and ordinances must be adhered to.

ARGUMENT E: How would we have known that subdivision within an Historic District is prohibited even though the regulations have been met?

"Due process inexorably commands **notice** which **reasonably** informs person

that his legally protected interest may be adversely affected" Re G (1981) 637 P2d 66.

Petitioners lived in their same neighborhood, on the same block, when this particular Historic District was being formed. At the organizational meeting, the Historic District Commission (HDC) NEVER said that subdivision and building was not possible, only that new structures and changes must be compatible.

The Petitioners studied the power and authority of the Historic District Commission (HDC) in Connecticut. It is clear from CGS 7-147 (a-k) that the HDC has no authority over LAND USE. They only have the Certificate of Appropriateness mechanism to insure congruent house design.

Petitioners' property deed was mentioned by the Conn. Supreme Court as having given adequate notice. However, the the deed only says: **"Regulations imposed by reason of the fact that the premises are part of an historic district..."** It is clear that the Petitioners' property deed does not prohibit subdivision and building within this Historic District.

P & Z staff worked closely with the Petitioners in the development of this subdivision. They would not have done so if they had known that subdivision in the historic district was not possible. P & Z Board was also unaware because they granted preliminary approval and anticipated construction of a house. This proves that there was no notice.

The US Supreme Court clarified that the definition of "unconstitutionally vague" ordinance was determined "not only because it contains no definition

of the term (involved) but also because it lacks any ascertainable standard for compliance so that ... owner does not know ...(what is required)" Entertainment Concepts, Inc., III v Maciejewski (1980) 450 US 919

"...statute is unconstitutionally vague under due process clause, where its language does not convey sufficiently definite warning as to proscribed conduct when measured by common understanding and practices, or stated otherwise, where its language is such that men of common intelligence must necessarily guess at its meaning..." Jordan v De George (1951) 341 US 223.

The phrase "public health and safety" **has no standards regarding historic factors** by which it could be used within subdivision regulations for those affected and for those commissions who must make decisions.

IMPACT: If this decision is allowed to stand, it will create chaos in land development because of its' vagueness. The law will be diluted and there will be a proliferation of court cases. There will be an increased effort on the part of the courts to decide these kinds of cases because the standards used to judge them will be unpredictable and unmeasurable. The value of certainty will be lost, and so will the creation of future Historic Districts.

The US Supreme Court has ruled similarly on vagueness of standards: they "...refused to open the door to such a liberalized rule...explained that "once the door is opened to such (inquiries), it is difficult to limit their scope in any principled manner..." 468 US 195-196

REASON III

The Court has ruled **inappropriately** on the **Constitutional** issue of **Due Process, equal protection** under the law, and **taking** without just compensation and the U.S. Supreme court should decide this issue: **Can the property owners within an Historic District be treated differently from one another and from other comparable zones, without 1) written statutes and ordinances that specifically obstruct sub divisions and 2) without prior notice?**

DUE PROCESS

Due Process requires that a fair hearing has taken place. Yet:

1. Defendant's attorney testified to the Appellate Court that this Subdivision met all the requirements and would have been approved if it had been in any other comparable zone.

2. The Conn. Supreme Court acknowledged that this subdivision met the legal requirements when it phrased the issue for review: "In acting on a subdivision proposal that **conforms to applicable zoning regulations,** may a P & Z take into account the fact that the property is located in an Historic District and that the development of the property may be inconsistent with historic preservation of the district?"

3. The Appellate Court and the Conn Bar Asso have demonstrated that neither ZBA nor the HDC have any state statutes nor any local ordinances which allow the consideration of Historic factors to prohibit subdivision and building within an Historic district.

4. Simultaneously, other new construction was allowed to take place

within the very same Historic District. This is evidence of invidious discrimination under the law.

"Due process is secured if laws operate on all alike, and do not subject individuals to arbitrary exercise of powers of government." Missouri P.R. Co. v. Mackey (1988) 127 US 205

How could the defendants presume that the petitioners' subdivision would adversely impact public health and safety yet the neighbors building did not? "Statutes creating permanent irrebuttable presumptions, which are neither necessarily nor universally true, are disfavored under both Fifth and Fourteenth Amendments, because they preclude individualized determination of facts upon which substantial rights or obligations may depend. " Coleman v Darden (1979) 444 US 927.

It appears prima facie that there was discrimination against the petitioners, when neighbors (The Historical Society) were allowed to construct a new building in 1987. "Party who complains of violation of equal protection clause must show that **anyone comparably situated has been treated differently.**: National Union of M.C. & S. v Arnold (1954) 348 US 37.

"Discriminations which are open to objections are those where persons ...are **held entitled to different privileges under same conditions;** it is only then that discrimination can be said to impair that equal right which all can claim in enforcement of law." Soon Hing v Crowley (1885) 113 US 703. Citizens both within our historic district and within other comparable R-7 zones are entitled to subdivide, while petitioners are denied equal protection

of property rights under the law. This is inviolation of 42 USCS Sec 1983 Civil Rights Act of 1871.)

TAKING

The petitioners are entitled to a "free throw" in their property because the land was last divided in 1911. They bought the property because it had two extra building lots in compliance with all the known planning and zoning codes. In Gil v. Inland Wetlands et al, 23 Conn. App.379, the Court evaluated the takings issue and stated: "The plaintiff purchased the land as a building lot, and it was that value that was destroyed..."

Proof of this free throw ability is documented in the original Planning and Zoning Preliminary Approval dated April 21, 1987, issue no. 2: "...a gross area which **includes a free-throw lot...**" The above is quoted in the Conn. Supreme Court Decision: 227 Conn. 71, p.74, footnote 2.

The Petitioners can legally take this free throw in the front of their property at any time by presenting their deed and the property map to the Town legal department. Therefore, the front lawn, (known as Lot I) which is more than 53 % of the total property, must be considered as a **separate entity**. To deny building on it is to deny the petitioners of **100%** of **any** economically viable use of this building lot and of any worthwhile rights or benefits.

COMMENTS ON ALTERNATIVES

The state courts continually state that the petitioners have alternatives. Yet, within the ZBA hearing, the chairman stated that the only alternative, (condominiums on the rear of the property, which would require a

zoning code change, many variances, and special exceptions,) would never receive approval.ZBA transcript pt.I.p58.

First and foremost, why should the Petitioners be forced to consider alternatives (which are unacceptable to them as well as to their neighbors), when their subdivision is legally in complete compliance of the laws and is the only option within the zoning code?

Obviously, the defendant Town wishes to use the Petitioners front lot as a public open space. In the US Supreme Court case of Mercedes Dredging Co. v. Mercedes County 67 F Supp 598, it was stated that "where public desires to preserve scenic or historical features of privately owned land, the power of eminent domain is available, and constitutional requirement of just compensation secures private interests of owner."

The US Supreme Court also ruled that "...the Fifth Amendment requires the state to pay for any such easement (to the beach) even if the requirement of a public easement is justified...because the public interest would be served..." Nollan v California Coastal Comm'n 483 US 825.

In Armstrong v U.S.,(1960) 364 US 40, the US Supreme Court stated that "the Fifth Amendment just compensation clause...was designed to bar government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole."

The Petitioners state a claim upon which relief can be granted. If the Town of Greenwich wants over half of the Petitioners' total property and **100%** of the front building lot for historic

preservation, it is constitutionally required to justly compensate the owners. "A taking requires sovereign to pay for what is actually gains." USCA Constitutional Amendments 5, 14.

SUMMARY OF DUE PROCESS, TAKING AND CIVIL RIGHTS

"There is denial of due process where inherently vague statutory language permits selective law enforcement." Smith v Goguen (1974) 415 US 566.

When a case is evaluated for violation of due process, the court must ask "was the decision a mere excuse for unjust discrimination or an exercize of a reasonable discretion?" Kauper, Paul & Beytagh, Franc, Constitutional Law. Little Brown & Co.Boston,1980.page 704.

What is reasonable or rational about saying that a subdivision that meets the written rules in a neighborhood of similar homes will damage public health or safety or the environment? "Equal protection clause requires more of state law than **nondiscriminatory** application within class it establishes; it also imposes requirement of **some rationality** in nature of class singled out." Rinaldi v Yeager (1966) 384 US 305.

Petitioners have been denied their property rights based on the 5th and 14th Amendments of the US Constitution and on sections 8 and 11 of Article one of the Connecticut Constitution. While presevation is a worthwhile objective, it is not fair to penalize Historic District residents by changing rules after they have voted their property into the Historic District.

Petitioners have been denied their civil rights under 42 USC Sec. 1983 by

being prevented from using their land just like their neighbors, while the defendant Historic Society was allowed new construction just 100 ft. away.

"Equal protection of laws requires equal operation of laws upon all persons in like circumstances." Maxwell v Bugbee (1919) 250 US 525.

Discrimination of classification is not justified if the Town has another option of reaching the same goal (ie, preserving Petitioners property as open space). Witt, Elder: The Superior Court from A-Z. Congressional Quarterly Inc. Washington, DC: 1993. page 156.

The defendant Town has the **alternative** of **EMINENT DOMAIN.** If they want Petitioners property as a public park, they should purchase it, just as they have obtained other parcels.

"...affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use...by requiring land to be left substantially in its natural state ---carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." Annicelli v. South Kingston (1983) 463 A.2d 133, 140-141.

IMPACT of ALLOWING DECISION TO STAND

This case represents an important question affecting property rights and historic preservation. The U.S. Supreme Court needs to give guidance and clarification to the States to insure property rights, due process rights and equal protection under the law within Historic Districts, and Historic

Overlays of properties and structures everywhere. It is deemed necessary for the future of historic preservation that the U.S. Supreme Court exercise its power of supervision to protect all residents of Historic Districts and properties across America.

If this Connecticut decision is allowed to stand, the long term impact will be that citizens will no longer be willing to allow their property to be included within Historic Districts as the power of authority is vague and without limitation. The result will be counter productive to the goal of continued Historic Preservation.

The Court acted in violation of its own statutory and **constitutional rules** by supporting ZBA in preventing this legal subdivision. The Conn. Supreme Court decision is erroneous and wholly arbitrary, as there is no rational or factual basis for the judgment.

The petitioners have proven that "it was willful and unreasoning action, without consideration and in disregard of the facts and circumstances of the case." First National Bank of Fayetteville v. Smith 421 US 1371.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Connecticut Supreme Court.

Respectfully submitted,

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35 Strickland Rd.
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January 5, 1994 Petitioners

A-P-P-E-N-D-I-X

APPENDIX - VOLUME I

CONNECTICUT SUPREME COURT DECISION...01A

LOCATED WITHIN **APPENDIX VOLUME II:**

AMICUS CURIAE BRIEF
CONNECTICUT BAR ASSOCIATION.....32A

APPELLATE COURT DECISON 53A

SUPERIOR COURT DECISION.....68A

ZONING BOARD OF APPEALS.....90A

PLANNING AND ZONING DENIAL.....94A

PLANNING AND ZONING PRELIMINARY
APPROVAL.....96A

E. DON SMITH ET AL. *v.* ZONING BOARD OF APPEALS OF THE TOWN OF GREENWICH ET AL.
(14632)
(14633)

PETERS, C. J., CALLAHAN, BORDEN, BERDON and KATZ, Js.

The plaintiffs appealed to the trial court from a decision by the defendant zoning board of appeals of the town of Greenwich sustaining the planning and zoning commission's denial of their application to subdivide certain of their real property located in a historic district. The commission determined that granting the application would have disrupted the character of the historic district, and the board, after a de novo review of the application and a hearing on it, concluded, inter alia, that the proposed use of one of the lots to be created would not be consistent with the district's historic streetscape. The board also concluded that the proposed subdivision did not conform to the town plan of development. The trial court granted the motion of the Historical Society of the Town of Greenwich, Inc., to be made a defendant, and thereafter rendered judgment dismissing the plaintiffs' appeal, from which the plaintiffs, on the granting of certification, appealed to the Appellate Court. The Appellate Court concluded that the planning and zoning commission lacked the authority to promulgate subdivision regulations providing for the consideration of historical or architectural factors, and it reversed the judgment of the trial court. On the granting of certification, the defendants appealed to this court. *Held:*

1. The Appellate Court incorrectly determined that because the provision of the Greenwich town charter addressing subdivision applications does not specifically refer to historical factors, the commission lacked the authority to promulgate the regulations in issue here, which provided for the consideration of historical factors in connection with such appli-

cations; the charter provision giving the commission the power to protect "public health and safety" includes the power to protect the environment, which in turn includes historic preservation.

2. The Appellate Court correctly determined that the town charter prohibited the denial of a subdivision application, like the plaintiffs', on the basis of nonconformance with the town plan, the charter explicitly providing that a subdivision application cannot be denied solely on the basis of the town plan; the record revealed, however, that, as claimed by the defendants, there were alternative grounds on which the Appellate Court could have sustained the decision of the trial court, the commission being authorized to consider historical factors under the subdivision regulation that permits the commission in its discretion to require an environmental assessment.

3. The Appellate Court incorrectly concluded that the terms "historical factors" and "historic streetscapes" in the subdivision regulations at issue did not comply with the established rules requiring regulations to be reasonably precise, adequate and sufficient; the regulations here sufficiently apprised the plaintiffs of the factors that would be considered in evaluating their application.

4. The Appellate Court incorrectly concluded that it was the duty of the historic district commission, not the planning and zoning commission, to decide whether a building should be erected in a historic district; the applicable statute (§ 7-147c [j]) authorizes a historic district commission to cooperate with other regulatory agencies interested in preservation, and the statutes do not confer exclusive powers on a historic district commission.

5. The Appellate Court incorrectly concluded that the subdivision regulations encroached on an area that is uniquely a zoning power; the record did not indicate any conflict between the pertinent subdivision regulations and the applicable zoning regulations.

6. The plaintiffs could not prevail on their claim that the decision of the Appellate Court could be upheld on the ground that the denial of their subdivision application constituted an unconstitutional taking of their property without just compensation, they having failed to sustain their burden of proving that there were no other viable options for the property.

Argued April 28—decision released August 10, 1993

Appeal from a decision by the named defendant denying the plaintiffs' application to subdivide certain of their real property, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Cioffi, J.*, granted the motion to be made defendants filed by the Historical Society of the Town of

Greenwich, Inc., et al.; thereafter, the matter was tried to the court, *Ryan, J.*; judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to the Appellate Court, *Daly, Norcott* and *Lavery, Js.*, which set aside the trial court's judgment and remanded the case with direction to render judgment sustaining the appeal and ordering the granting of the subdivision application, and the named defendant and the defendant Historical Society of the Town of Greenwich, Inc., et al., on the granting of certification, filed separate appeals to this court. *Reversed; judgment directed.*

Joyce H. Young, assistant town attorney, and *Everett E. Newtown*, with whom, on the brief, were *William E. Hegarty, Russell L. Brenneman* and *John C. Yavis, Jr.*, for the appellants (defendants).

E. Don Smith, pro se, with whom was *Eileen Smith*, pro se, the appellees (plaintiffs).

Robin Messier Pearson, Michael J. Cacace and *Mark K. Branse* filed a brief for the Planning and Zoning Law Section of the Connecticut Bar Association as amicus curiae.

KATZ, J. The dispositive issue in this appeal is whether the planning and zoning board of appeals for the town of Greenwich (board) is authorized, under the Greenwich town charter (charter) and the applicable subdivision regulations, to consider historical factors in determining whether to grant or deny an application to subdivide property located in a historic district. The defendants, the board, the Historical Society of the Town of Greenwich, Inc. (historical society), and Anita De Lesseps Keefe, a landowner within 100 feet of the property, appeal, upon our grant of certification,[1] from

[1] We granted certification to appeal the following issue: "In acting on a subdivision proposal that conforms to applicable zoning regulations, may a planning and zoning commission take into account the fact that the prop-

the judgment of the Appellate Court. The Appellate Court concluded that the board had not been authorized to consider historical factors in reviewing a subdivision application and reversed the judgment of the trial court. *Smith* v. *Zoning Board of Appeals*, 29 Conn. App. 28, 35, 614 A.2d 464 (1992). We disagree with the Appellate Court and, accordingly, reverse the judgment.

The following relevant facts are undisputed. The plaintiffs, E. Don Smith and Eileen Smith, own property located at 35 Strickland Road in Greenwich (property). The property is situated in the Mill Pond Historic District (district), which was established under article 5 of the charter and General Statutes § 7-147b. The property is also in an R-7 zone classification, which encompasses single homes.

In January, 1987, the plaintiffs submitted a preliminary subdivision application to the planning and zoning commission of the town of Greenwich (commission), seeking to subdivide the property into three lots. After a hearing, the commission preliminarily approved the plaintiffs' application, subject to the resolution of fourteen issues prior to the submission of the final application.[2] In particular, the commission required the

erty is located in a historic district and that the development of the property may be inconsistent with historic preservation of the district?" *Smith* v. *Zoning Board of Appeals*, 224 Conn. 912, 913, 617 A.2d 167, 168 (1992). In the proceeding at issue here, the zoning board of appeals acted, in effect, as the planning and zoning commission because it reviewed the challenged decision of the commission de novo. See footnote 4.

[2] The commission's preliminary approval provided the following: "1. That Lot 1 be shifted to the southerly property boundary of the tract. Concurrently that portion of the park and playground area displaced by the relocation of Lot 1 shall be moved to the northerly property line of Lot 1.

"2. The Commission observed that the area reserved for park and playground being 14.67%, conventionally required to be 15%, is acceptable as it is calculated from a gross area which includes a free-throw lot for which park and playground is not required.

"3. The utility easement shall be located so as to minimize impacts to significant trees.

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plaintiffs to meet with the historic district commission "in order to determine an appropriate house location for lot 1." The commission further instructed that "[t]he preservation of significant trees shall be taken into consideration in determining house location, as well as conformity as nearby as possible to the existing setback/streetscape of house locations to the south."

Pursuant to the commission's requirement, the plaintiffs met with members of the historic district commis-

"4. The applicant shall meet with the Historic District Commission in order to determine an appropriate house location for Lot 1. The preservation of significant trees shall be taken into consideration in determining house location, as well as conformity as nearby as possible to the existing setback/streetscape of house locations to the south.

"5. The applicant shall meet with the Conservation Coordinator in order to develop tree preservation details as required by house and utility easement siting.

"6. That the Declaration of Restrictions for the reserved areas be submitted to the Law Department in accordance with the model document.

"7. That provisions for access easements be indicated on the record sheet.

"8. That the existing southerly curbcut be the sole accessway to Lot 1.

"9. That the appropriate utility easements to the northerly property (Ward) be indicated on the record sheet.

"10. That a sight line improvement plan indicating any modifications to existing features of walls and trees, etc., be submitted for review and approval by the Department of Public Works. Historic District Commission should also comment on alternate plans to achieve acceptable sight distance, if significant trees or the stone wall are adversely [a]ffected.

"11. The applicant must obtain a sewer permit prior to the issuance of a Building Permit.

"12. The applicant shall obtain confirmation from the Engineering Division that there will be no adverse impacts to nearby properties and water bodies due to site drainage.

"13. The following note is to appear on the construction sheet: 'Prior to any excavation(s) the applicant(s), in accordance with Public Act 77-350, shall be required to contact Call Before You Dig, Inc., at 1-800-922-4455 for markout of underground utilities.'

"14. Submit a driveway plan in accordance with Sec. 6-131 [of the Greenwich Municipal Code]. In the event significant open space or trees are impacted, it is recommended that the applicant apply for a variance in order to use as much of the existing driveway as possible while providing safe sight distance and maneuverability. The plan should be reviewed with Planning Staff, HDC [historic district commission] and D.P.W. [department of public works] prior to submitting final plan."

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sion. Although, in the absence of a final, approved subdivision plan the historic district commission could not take any formal action concerning the appropriateness of the building on lot 1, the historic district commission did, nonetheless, express its opposition to the proposal.

The plaintiffs subsequently submitted a final subdivision application. On November 22, 1988, the commission denied the plaintiffs' final subdivision application because granting it would "permit construction of a house in the . . . significant open space, thereby disrupting the essential characteristic of the historic district."[3]

The plaintiffs appealed from the decision of the commission to the board pursuant to § 103 (a) of the char-

[3] The commission adopted the following final resolution: "WHEREAS, the Town of Greenwich Plan of Development, 1984 states as a basic development objective the preservation of historic and architectural resources; and

"WHEREAS, the subject lot is contained within the duly established Mill Pond Historic District, and

"WHEREAS, the Commission recognizes that the existing streetscape, which is defined by the open space of the subject tract in relation to adjoining historical properties, structures, and open spaces is a significant element of the historic district in terms of visual appearance as well as historic use and occupancy of the land; and

"WHEREAS, the subdivision would permit construction of a house in the previously defined, significant open space, thereby disrupting an essential characteristic of the historic district; and

"WHEREAS, a stated purpose of the Subdivision Regulations of the Town is to 'Further the orderly development of the Town in accordance with the Town Plan of Development' "; and

"WHEREAS, the Commission finds that there are other zoning options for development of the property which would provide for the same or greater number of dwelling units while preserving the site's open space and natural features which are significant components of the historic streetscape;

"THEREFORE, BE IT RESOLVED that final Subdivision #1066 of E. Don Smith and Eileen Smith owners of property located on Strickland Road consisting of a record sheet prepared by J.A. Kirby Company dated March 17, 1988 revised September 26, 1988 is hereby denied."

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ter.[4] Pursuant to § 103 (a), the board conducted a de novo review of the application and held a public hearing. The board found that the plaintiffs were seeking to subdivide the property into three lots. Lot 1 would contain the plaintiffs' residence; lot 2 would contain an existing barn; and lot 3, a presently unimproved area in front of the plaintiffs' residence, would contain a single family house. The proposed building on lot 3 is the focus of this dispute.

Following the public hearing, the board denied the plaintiffs' appeal. The board concluded that the proposed building on lot 3 would disrupt the "sweeping front lawn" and, therefore, would not be consistent with the district's historic streetscape. The board stated that "[t]he proposed subdivision did not meet the purposes of the Subdivision Regulations as provided in Section 6-260,[5] thereof. It does not conform to the Town of Greenwich Plan of Development in that it does not meet the basic objectives of preservation of historic and architectural resources. Furthermore, it does not preserve the natural features of the landscape; namely, the historic streetscape." The board also concluded that the plaintiffs' application was subject to review under the Coastal Area Management Act (act), General Stat-

[4] Section 103 (a) of the Greenwich town charter provides: "The action of the Commission in approving or disapproving any subdivision may be reviewed by the Planning and Zoning Board of Appeals on petition by any Town agency, the Board of Education or the Housing Authority, by any person owning property in the Town, or by the person seeking approval of such subdivision, provided written notice of such petition is filed by the petitioner with the Commission and the Town Clerk within twenty (20) days from the effective date of such action. Upon receipt of such written notice, the Commission shall transmit a record of the proceedings had before it to the Planning and Zoning Board of Appeals which after a public hearing had de novo shall have the power to uphold or reverse such action."

[5] Section 6-260 of the Greenwich Land Use Regulations, also referred to as the subdivision regulations, provides in pertinent part: "PURPOSES OF ARTICLE. (a) The purposes of this Article shall be to: (1) Further the orderly development of the Town in accordance with the Town Plan of Development."

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utes § 22a-90 et seq. Applying the standards in the act, the board found that the subdivision proposal "would have an adverse impact on coastal resources because of the alteration of natural features of vistas."

The plaintiffs appealed from the decision of the board to the trial court pursuant to § 104 of the charter and General Statutes § 8-8 (2) (b).[6] Although the trial court disagreed with the applicability of one of the statutes, the act, on which the board had relied, the court concluded that other statutes, as well as the town's own land use regulations, supported the board's action. The trial court therefore dismissed the plaintiffs' appeal.

The trial court concluded that the board had the authority to consider the historic streetscape for three reasons: the provisions of the town's subdivision regulations, the statutory and town policy in favor of historic preservation and a restriction contained in the plaintiffs' deed. Section 6-260 provides that the purpose of the subdivision regulations is to "[f]urther the orderly development of the Town in accordance with the Town Plan of Development." Because the town plan has "as one of its 'Basic Objectives' the preservation of historic resources," the trial court concluded that the board acted within its authority in considering the historic streetscape. Additionally, § 6-266 (a) (20) of the Greenwich Land Use Regulations specifically permits an evaluation of historical factors, noted in § 6-266 (a) (19), in subdivisions located "within the coastal zone." Furthermore, the town's subdivision regulations are consistent with public policy favoring historic preservation

[6] Section 104 of the Greenwich town charter provides: "SUBDIVISION APPEALS. Any person aggrieved by an official action of the Planning and Zoning Board of Appeals may appeal therefrom in the manner and with the effect provided in Sec. 8-28 of the General Statutes."

General Statutes § 8-8 (2) (b) provides in pertinent part: "[A]ny person aggrieved by any decision of a board may take an appeal to the superior court for the judicial district in which the municipality is located."

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that is contained in General Statutes § 7-147a et seq. and § 6-307 of the Greenwich Land Use Regulations. Finally, a restriction in the plaintiffs' deed states that " '[s]aid premises are conveyed subject to . . . [r]egulations imposed by reason of the fact that the premises are part of a historic district as established by the Town of Greenwich. . . .' "

The trial court affirmed the board's conclusion that the plaintiffs' subdivision proposal would impair the historic streetscape. The trial court reasoned that "[t]he Smiths' side of Strickland Road is characterized by homes on lots with sweeping front lawns. The plaintiffs plan to convert their front lawn into a building lot and construct thereon a house with the thirty feet by forty feet footprint, and setbacks of twenty-five feet from the front property line, twenty feet from the south property line, and fifteen feet from a line of trees. These exhibits show that construction of a house on the front lawn would drastically alter the streetscape, and support the Board's conclusion in that regard."

Finally, the trial court considered the plaintiffs' argument that "the denial of their plan constitutes a taking of property without due process of law." The court noted, however, that "[t]he Board rejected this claim, concluding that because other alternatives for development of the property exist, the plaintiffs were not deprived of their development rights. The defendant Board argues that [the] plaintiffs have failed to establish a diminution in the value of their property as a result of the decision, and further, only one proposal has been rejected, not all proposals."

Upon a grant of certification, the plaintiffs appealed to the Appellate Court, from the trial court's dismissal of their appeal. The Appellate Court reversed the judgment of the trial court, concluding that the board did not have the authority to consider historical factors in

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deciding whether to grant or deny a subdivision application because: "(1) the enabling statutes on subdivisions did not give the board the authority to include historical factors in its regulations; (2) the terms 'town plan of development,' 'historic factors' and 'historic streetscape' are not known and fixed standards required for subdivision regulations; (3) the Greenwich town charter forbids the board from denying a subdivision application based on the plan of development; and (4) it is the duty of the historic district commission, not the planning and zoning commission or the board of appeals, to decide whether a building should be erected in a historic district." *Smith* v. *Zoning Board of Appeals*, supra, 35. Having ourselves granted certification for the defendants to appeal, we now reverse the judgment of the Appellate Court.

I

In reviewing an appeal from an administrative agency, the trial court must determine whether " 'the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion.' " *Board of Education* v. *State Employees Retirement Commission*, 210 Conn. 531, 541, 556 A.2d 572 (1989); *Frito-Lay, Inc.* v. *Planning & Zoning Commission*, 206 Conn. 554, 573, 538 A.2d 1039 (1988). " 'The trial court may not retry the case or substitute its judgment for that of the agency . . . .' " *Board of Education* v. *State Employees Retirement Commission*, supra, 540; *Burnham* v. *Planning & Zoning Commission*, 189 Conn. 261, 265, 455 A.2d 339 (1983). The principal issue in this case, however, presents "questions of law turning upon the interpretation of statutes." *Board of Education* v. *State Employees Retirement Commission*, supra. The defendants dispute the Appellate Court's conclusion that no statutory or regulatory authority existed allowing the commission to consider historical factors. "[T]he construction of a statute on an issue that has not previ-

ously been subjected to judicial scrutiny is a question of law on which an administrative ruling is not entitled to special deference." (Internal quotation marks omitted.) Id.

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The defendants claim initially that the Appellate Court incorrectly concluded that the commission lacked the authority to promulgate subdivision regulations that provide for the consideration of historical or architectural factors. We agree with the defendants.

"It has been said that the whole field of subdivision regulation is peculiarly a creature of legislation. It is therefore imperative that before subdivision regulations may be made operative, the necessary statutory authorization of such regulation must exist. . . . In other words, in order to determine whether the regulation in question was within the authority of the commission to enact, we do not search for a statutory prohibition against such an enactment; rather, we must search for statutory authority for the enactment." (Internal quotation marks omitted.) *Finn* v. *Planning & Zoning Commission*, 156 Conn. 540, 545, 244 A.2d 391 (1968). In determining whether the board had the authority to deny subdivision applications for historical reasons, we must first determine whether the commission has the authority to enact subdivision regulations that provide for such consideration. The town of Greenwich exercises its zoning power by virtue of a special act.[7] 26 Spec. Acts 325, No. 469 (1951). "This act established the [Greenwich Town Charter], which is the source of

[7] Municipalities in Connecticut may exercise zoning power either by adopting the provisions of chapter 124 of the General Statutes, §§ 8-1 through 8-13a, or by enacting a municipal charter authorized by a special act of the legislature. *Burnham* v. *Planning & Zoning Commission*, 189 Conn. 261, 263–64, 455 A.2d 339 (1983). "In either case, the power of the local zoning authority to adopt regulations is limited by the terms of the statute or special act." T. Tondro, Connecticut Land Use Regulation (2d Ed. 1992) p. 42.

authority" to enact and enforce subdivision regulations. *Norwich* v. *Norwalk Wilbert Vault Co.*, 208 Conn. 1, 8, 544 A.2d 152 (1988); *O'Meara* v. *Norwich*, 167 Conn. 579, 581, 356 A.2d 906 (1975). "The charter serves as an enabling act, both creating power and prescribing the form in which it must be exercised. . . ." (Internal quotation marks omitted.) *West Hartford Taxpayers Assn., Inc.* v. *Streeter*, 190 Conn. 736, 742, 462 A.2d 379 (1983). "Agents of a city, including commissions, have no source of authority beyond the charter. *Perretta* v. *New Britain*, 185 Conn. 88, 92, 440 A.2d 823 (1981)." (Internal quotation marks omitted.) *Norwich* v. *Norwalk Wilbert Vault Co.*, supra, 8–9.

The charter is the source of authority governing subdivisions, except if there is a clear legislative intent that the General Statutes control. *Pizzola* v. *Planning & Zoning Commission*, 167 Conn. 202, 206, 355 A.2d 21 (1974). The power of the planning and zoning commission to adopt subdivision regulations is limited by the terms of the statute or special act. *Caldrello* v. *Planning Board*, 193 Conn. 387, 391, 476 A.2d 1063 (1984); *Bishop* v. *Board of Zoning Appeals*, 133 Conn. 614, 619, 53 A.2d 659 (1947); see, e.g., *Reed* v. *Planning & Zoning Commission*, 208 Conn. 431, 544 A.2d 1213 (1988). "The ordinance must rest primarily upon the enabling act and must not go beyond the power delegated by it." *Bishop* v. *Board of Zoning Appeals*, supra.

Section 83 of the charter established the planning and zoning commission. In addition to other powers granted to the commission by the charter, § 83 also conferred upon the commission "the powers and duties conferred upon zoning commissions under the General Statutes." Section 101 of the charter sets forth those areas that the commission's subdivision regulations are meant to control or regulate. Section 101 (d) provides that "[t]he regulations shall provide that the land to be subdivided shall be of such character that it can be used for build-

ing purposes without danger to health or the public safety, that proper provision shall be made for water, drainage and sewerage, and, in areas contiguous to brooks, rivers or other bodies of water subject to flooding, including tidal flooding, that provision shall be made for protective flood control measures and that the proposed streets are in harmony with existing or proposed principal thoroughfares shown in the Plan of Development as described in Section 94, especially in regard to safe intersections with such thoroughfares, and so arranged and of such width, as to provide an adequate and convenient system for present and prospective traffic needs."[8] General Statutes § 8-25, the applicable section of the General Statutes, is substantially the same.

The plaintiffs argue that neither § 101 of the charter nor any other section of the charter addressing subdivisions specifically refers to historical factors. By contrast, there is specific language authorizing the commission to regulate and make provisions for such matters as water, drainage, sewage, flood control, street layout and grading, public utilities and the provision of parks and playgrounds. Greenwich Town Charter § 101 (d), (e) and (g). Thus, the plaintiffs maintain that because the charter specially refers to several items that must be provided for in the regulations, and does

[8] Section 101 of the Greenwich town charter provides in pertinent part: "(a) No subdivision of land shall be made until a plan for such subdivision has been approved by the Commission. Any person, firm or corporation making any subdivision of land without the approval of the Commission shall be fined not more than Two Hundred Dollars ($200.00) for each lot sold or so subdivided. . . .

"(c) Before exercising the powers granted in this Section the Commission shall adopt regulations covering the subdivision of land. No such regulations shall become effective until after a public hearing, notice of the time, place and purpose of which shall be given by publication in a newspaper of general circulation in the municipality at least seven (7) days prior to the date of such hearing, and until the same or any material amendment thereof, shall be approved by the Representative Town Meeting."

not expressly include the consideration of historical factors, the commission lacks the authority to enact subdivision regulations that allow consideration of historical factors.

The defendants claim, on the contrary, that the commission's authority to promulgate regulations that consider historical factors arises from § 101 (d) of the charter, which provides that subdivision "regulations shall provide that the land to be subdivided shall be of such character that it can be used for building purposes without danger to *health or the public safety* . . . ." (Emphasis added.) The defendants argue that public health and safety includes protecting the environment, which, in turn, includes historic preservation. We agree with the defendants.

Although neither the charter nor the General Statutes provides a specific definition of "public health and safety" in the context of zoning regulations, other related statutes establish that environmental conservation is a legitimate concern within this broad regulatory rubric. The Environmental Protection Act (EPA); General Statutes § 22a-1 et seq.; includes the environment as a facet of public health and safety. Section 22a-1 provides in part that "the policy of the state of Connecticut is to conserve, improve and protect its . . . *environment* . . . in order to enhance the *health, safety* and welfare of the people of the state." (Emphasis added.) In addition, the Inland Wetlands and Watercourses Act; General Statutes § 22a-28 et seq.; provides that "[t]he preservation and protection of the wetlands and watercourses . . . is essential to the health, welfare and safety of the citizens of the state. . . ." General Statutes § 22a-36; see *Mario* v. *Fairfield*, 217 Conn. 164, 168, 585 A.2d 87 (1991). These statutes illuminate the statutory phrase before us in this case because they address generally related subjects that the legislature may be presumed to have considered

in like manner. *Link* v. *Shelton*, 186 Conn. 623, 627, 443 A.2d 902 (1982). In light of these principles, we find a relationship between protecting the public health and safety and protecting the environment. Accordingly, we conclude that public health and safety includes consideration of the "environment."

Although this court has not defined the contours of the term "environment," we may look again to the meaning given to this term in other statutory provisions. *Link* v. *Shelton*, supra. Once it is established that "public health and safety" includes consideration of environmental concerns, the environmental statutes make it clear that historical factors are a recognized element of environmental law. The EPA in General Statutes § 22a-1c includes a broad definition of actions that significantly affect the environment: "activities . . . proposed to be undertaken by state departments, institutions or agencies . . . which could have a major impact on the state's . . . *historic structures* . . . ." (Emphasis added.) Additionally, General Statutes § 22a-19a states in part that the EPA "shall be applicable to the unreasonable destruction of *historic structures* and landmarks of the state, which shall be those properties (1) listed or under consideration for listing as individual units on the National Register of Historic Places (16 USC 470a, as amended) or (2) which are a part of a district listed or under consideration for listing on said national register and which have been determined by the state historic preservation board to *contribute* to the *historic significance of such district.*" (Emphasis added.) The EPA recognizes that the protection of many environmental concerns, such as air and water, is essentially the preservation of the resource that is being used. These regulations " 'guarantee that important land functions continue to operate while the land is being used, no matter what the use.' " T. Tondro, Connecticut Land Use Regulation

(2d Ed. 1992), p. 263. Similarly, the protection of historical factors is a preservation of the function of the resource being used. Id.; see *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 108, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) ("[h]istoric conservation is but one aspect of the much larger problem, *basically an environmental one*, of enhancing . . . the quality of life for people" [emphasis added; internal quotation marks omitted]). We note, as well, that we have interpreted the power to protect the "general welfare" to include the authority to consider historical factors. *Figarsky* v. *Historic District Commission*, 171 Conn. 198, 207–209, 368 A.2d 163 (1976).

Accordingly, we conclude that because the phrase "public health and safety" includes environmental factors, it includes historical factors. The commission, therefore, had the authority to promulgate subdivision regulations that take into account historical factors.

B

We next must address whether the Appellate Court correctly determined that the town's charter prohibits the board from denying a subdivision application on the basis of nonconformance with the town plan.[9] We agree with the Appellate Court's conclusion that the board may not deny a subdivision application solely on the basis of nonconformance with the town plan.

[9] Although the plaintiffs did not raise this claim in the trial court, "[t]he court may in the interest of justice notice plain error not brought to the attention of the trial court." Practice Book § 4185; *Ralto Developers, Inc.* v. *Environmental Impact Commission*, 220 Conn. 54, 59, 594 A.2d 981 (1991). " 'We have noticed plain error in the failure of the trial court to apply a clearly relevant statute to the case before it.' " *Ralto Developers, Inc.* v. *Environmental Impact Commission*, supra; *State* v. *Hinckley*, 198 Conn. 77, 88, 502 A.2d 388 (1985). Because this charter limitation is applicable law, we will address it. *Cunningham* v. *Cunningham*, 72 Conn. 157, 160, 44 A. 41 (1899).

16A

In its decision, the board made clear that it denied the plaintiffs' subdivision application because it was not in conformance with the plan. As the Appellate Court noted, § 98 (b) of the charter states that "[t]he Commission shall not refuse approval of any subdivision on the ground that such subdivision creates or will tend to create a use of land contrary to that shown upon the Plan of Development, except insofar as the Commission may, under Section 101, require the streets and drains in such subdivision to conform to the street and drainage system shown on the Plan of Development."

"When a charter is construed the rules of statutory construction generally apply." *Arminio* v. *Butler*, 183 Conn. 211, 217, 440 A.2d 757 (1981). "In arriving at the intention of the framers of the charter the whole and every part of the instrument or enactment must be taken and compared together. In other words, effect should be given, if possible, to every section, paragraph, sentence, clause and word in the instrument and related laws. The real intention when once accurately and indubitably ascertained, will prevail over the literal sense of the terms. When the words used are explicit, they are to govern, of course. If not, then recourse is had to the context, the occasion and necessity of the provision, the mischief felt, and the remedy in view." (Internal quotation marks omitted.) Id., 217–18.

The charter explicitly provides that a subdivision application cannot be denied solely on the basis of the town plan. "[W]here the language is plain, we must give effect to the intention expressed in the regulation." *Schwab* v. *Zoning Board of Appeals*, 154 Conn. 479, 483, 226 A.2d 506 (1967). The charter limitation is consistent with this court's prior recognition that a town plan is merely advisory. *Lathrop* v. *Planning & Zoning Commission*, 164 Conn. 215, 223, 319 A.2d 376 (1973); *Spada* v. *Planning & Zoning Commission*, 159 Conn. 192, 200, 268 A.2d 376 (1970); *Dooley* v. *Town Plan*

& Zoning Commission, 154 Conn. 470, 473, 226 A.2d 509 (1967). The purpose of the plan is to set forth the most desirable use of land and an overall plan for the town. Greenwich Town Charter §§ 94, 97; see *Mott's Realty Corporation* v. *Town Plan & Zoning Commission*, 152 Conn. 535, 538, 209 A.2d 179 (1965). *Purtill* v. *Town Plan & Zoning Commission*, 146 Conn. 570, 572, 153 A.2d 441 (1959). Because the overall objectives contained in the town plan must be implemented by the enactment of specific regulations, the plan itself can operate only as an interpretive tool. See, e.g., *Raybestos-Manhattan, Inc.* v. *Planning & Zoning Commission*, 186 Conn. 466, 475, 442 A.2d 65 (1982). We agree, therefore, with the Appellate Court that the board incorrectly denied the plaintiffs' subdivision on the ground that it was inconsistent with the town plan.

C

Our conclusion that the board incorrectly denied the plaintiffs' application on the basis of noncompliance with the town plan would ordinarily require that we affirm the Appellate Court's judgment. On appeal to the Appellate Court, as well as on appeal to this court, however, the defendants raised alternative grounds in their briefs upon which the trial court's decision may be affirmed. After review of the defendants' arguments, we conclude that the Appellate Court incorrectly dismissed one of these alternate grounds. "[T]his court is authorized to rely upon alternative grounds supported by the record to sustain a judgment. . . . 'The . . . judgment will be affirmed, though based on erroneous grounds, if the same result is required by law.' " *Henderson* v. *Department of Motor Vehicles*, 202 Conn. 453, 461, 521 A.2d 1040 (1987); *Ivey, Barnum & O'Mara* v. *Indian Harbor Properties, Inc.*, 190 Conn. 528, 532, 461 A.2d 1369 (1983); *A & H Corporation* v. *Bridgeport*, 180 Conn. 435, 443, 430 A.2d 25 (1980); *Johnny Cake, Inc.* v. *Zoning Board of Appeals*, 180

Conn. 296, 301, 429 A.2d 883 (1980); C. Tait, Connecticut Appellate Practice and Procedure (1991) § 7.14. We conclude that the trial court correctly concluded that the board was authorized, under the subdivision regulations, to consider historical factors when it acted on the application.

In construing regulations, the general rules of statutory construction apply. *Schwartz* v. *Planning & Zoning Commission*, 208 Conn. 146, 153, 543 A.2d 1339 (1988) (applying rules of statutory construction to interpretation of zoning regulations); see *Ghent* v. *Planning Commission*, 219 Conn. 511, 518–19, 594 A.2d 5 (1991); *Sonn* v. *Planning Commission*, 172 Conn. 156, 159–60, 374 A.2d 159 (1976). The commission is limited by the power conferred upon it by the subdivision regulations. See *Reed* v. *Planning & Zoning Commission*, 208 Conn. 431, 544 A.2d 1213 (1988) (planning commission cannot exercise a power that has been admittedly delegated to it, unless its own regulations give it the right to exercise that power). Section 6-266 (a)[10] of the Greenwich

[10] Section 6-266 (a) of the Greenwich Land Use Regulations provides in pertinent part: "The preliminary layout shall include as many of the following items of information as is practicable. . . .

"(19) For a subdivision of ten (10) lots or more or the subdivision of ten (10) or more acres, an environmental assessment by qualified environmental specialists shall be provided. The Commission may require said assessment for smaller subdivisions if deemed necessary. The assessment shall include an evaluation of the following:

"(a) Conformance with the Open Space Plan of Development

"(b) Significant wetlands

"(c) Steep Slopes

"(d) Stormwater Drainage

"(e) Soils capabilities

"(f) Vegetation including forested areas and the identification of trees over 10" in caliper when not part of forested areas

"(g) Significant geological formations

"(h) Historical and archaeological factors

"(i) Animal habitats

"(j) Water availability and quality

Land Use Regulations sets forth the information that should be included in a preliminary subdivision application. "The preliminary layout shall be considered as a helpful guide in the preparation of a subdivision plan and should include the information set out in Section 6-266." Greenwich Land Use Regs. § 6-265. Subsection (a) of § 6-266 states that "[t]he preliminary layout shall include as many of the following items of information as is practicable." This general statement, set forth at the beginning of the regulation, indicates the commission's intent to require only the information that is pertinent to a particular subdivision application.

Section 6-266 (a) (19)[11] permits the commission in its discretion to require an environmental assessment in the preliminary layout of subdivisions of fewer than ten lots or ten acres.[12] Subsection (a) (19) lists twelve relevant considerations, including "[h]istorical and archaeological factors." Greenwich Land Use Regs. § 6-266 (a) (19) (h). In this case, the commission requested an evaluation by the historic district commission of the historic implications of the subdivision application. It also requested an evaluation by the required experts of some of the other considerations listed in § 6-266 (a) (19). It did not request that each and every one of these items be evaluated, presumably because it did not see such a need.

The plaintiffs argue that § 6-266 does not apply because the commission did not formally request an

"(k) Aquifer protection in accordance with the Statutes of the State of Connecticut

"(*l*) Other data which the Commission deems appropriate.

"The environmental assessment shall be subject to a review, after the receipt of recommendations of the Conservation Commission, by the Planning and Zoning Commission including the mitigation measures for minimizing environmental impact before the applicant proceeds to final plan."

[11] See footnote 10 for the text of Greenwich Land Use Regs. § 6-266 (a) (19).

[12] The property comprises fewer than ten acres or ten lots.

"environmental assessment." The consequence of the plaintiffs' argument is that, unless the commission formally requests each item of information by calling it an "environmental assessment," the commission cannot consider potentially relevant information. We decline to accept such a narrow construction of the regulation.

Regulations are to be construed as a whole. *Forest Construction Co.* v. *Planning & Zoning Commission*, 155 Conn. 669, 679, 236 A.2d 917 (1967). There is nothing in § 6-266 (a) that specifically requires that the commission label its request for information an "environmental assessment." Rather, "environmental assessment" is a general label for the types of information that the commission is authorized to consider in its determination of subdivision applications. Further, the intent of the preliminary layout is to convey relevant information to the commission in order to facilitate the process. This intent is indicated by the overall description of what should be included in a layout in § 6-266 (a), which states that the "preliminary layout shall include as many of the following items of information as is practicable."

The plaintiffs further argue that the commission did not consider a full environmental assessment as required by the language of § 6-266 (a) (19), which states that "[t]he assessment *shall* include an evaluation of the following . . . ." (Emphasis added.) The plaintiffs contend that this regulation makes it mandatory that each of the twelve factors listed be included in an assessment of the property to be subdivided. We disagree.

Although subsection (a) (19) of § 6-266 employs the word "shall," it does not make sense to require the commission to evaluate factors that are not relevant to a particular subdivision. Whether the word "shall" is

mandatory or precatory depends upon its context. See, e.g., *Caron* v. *Inland Wetlands & Watercourses Commission*, 222 Conn. 269, 273, 610 A.2d 584 (1992). In construction of the words of a regulation, like those of a statute, common sense must be used. *Police Department* v. *State Board of Labor Relations*, 225 Conn. 297, 303, 622 A.2d 1005 (1993). The items listed to be considered include some specific items that will not be implicated in every subdivision application. For example, in addition to historical and archaeological factors, the list includes animal habitats, significant geological formations and aquifer protection. Greenwich Land Use Regs. § 6-266 (a) (19) (g), (i) and (k). Not every subdivision application will require the consideration of each of these factors. It would be a waste of time, money and energy for the participants involved to be required to gather information that is not relevant to the subdivision application.

In addition, § 6-296 (d) of the Greenwich Land Use Regulations explicitly permits the commission to require a redesign of a subdivision plan "in order to protect environmental or historic resources" if the environmental assessment indicates the need for a redesign. Thus, the regulations specifically anticipate a situation, like the one at hand, where historical preservation requires the redesign of subdivision plans.

We also must look to the overall intent of the applicable regulations in considering subdivision applications. *Forest Construction Co.* v. *Planning & Zoning Commission*, supra. "Regulations, like statutes, do not exist in a vacuum." *Bombero* v. *Planning & Zoning Commission*, 218 Conn. 737, 743, 591 A.2d 390 (1991). As noted above, § 6-266 (a) requires the consideration of only that information that is necessary. Additionally, the purpose of the subdivision regulation is to "[f]urther the orderly development of the Town in accordance with the Town Plan of Development."

Greenwich Land Use Regs. § 6-260 (a) (1). Although, as noted above, the town plan cannot itself support the denial of a subdivision application, its provisions can serve as an interpretative guide to the meaning of properly enacted regulations. The plan has as one of its basic objectives the preservation of historic resources. The plan also provides that "Greenwich has a rich . . . historical heritage that should be protected for the benefit and enlightenment of future generations," and that "[c]onserving the Town's . . . historical resources is a notably effective land use tool for preserving the essential character and spirit of the community."

Accordingly, we conclude that § 6-266 (a) (19) (h) expressly permits the commission to consider historical factors.[13]

II

The defendants next claim that the Appellate Court incorrectly concluded that the terms "historical factors" and "historic streetscapes" do not comply with the established rules requiring regulations to be reasonably precise, adequate and sufficient. We agree with the defendants.

The standard for determining the adequacy of subdivision regulations is whether they " 'are as reasonably precise as the subject matter requires and are reasonably adequate and sufficient to guide the commission and to enable those affected to know their rights and obligations.' " *Nicoli* v. *Planning & Zoning Commission*, 171 Conn. 89, 93, 368 A.2d 24 (1976); *Forest Construction Co.* v. *Planning & Zoning Commission*,

[13] Because we conclude that the commission has authority under the charter and subdivision regulations to consider historical factors, we need not address whether the Coastal Area Management Act; General Statutes §§ 22a-90 through 22a-112; also allows the commission to consider historical factors.

supra, 680. Although some standards may be general, the regulation must be " 'reasonably sufficient to identify the criteria to be evaluated in their enforcement in order to meet the many variables involved since it would be impossible to establish one standard which would adequately cover all future cases.' " *Nicoli* v. *Planning & Zoning Commission*, supra, 93.

In this case, the commission's subdivision regulations sufficiently apprised the plaintiffs that historical factors would be considered in evaluating their subdivision application. In evaluating the regulations, we must construe them "as a whole since particular words or sections of the regulations, considered separately, may be 'lacking in precision of meaning to afford a standard sufficient to sustain' them." *Forest Construction Co.* v. *Planning & Zoning Commission*, supra, 679; *Ghent* v. *Planning Commission*, supra, 517; *Sonn* v. *Planning Commission*, supra, 162. Although § 6-266 (a) (19) does not specifically define the term historical factors, the general purpose of the regulations specifically references the town plan. Section 6-260 (a) (1) states that "[t]he purposes of this Article shall be to (1) [f]urther the orderly development of the Town in accordance with the Town Plan of Development." This reference puts prospective subdivision applicants on notice that the town plan will help define the specific terms in the subdivision regulations.

The plan has as one of its basic objectives "[t]o preserve historic and architectural resources." In its further discussion of the preservation of historical resources, the plan specifically mentions historical "streetscapes and districts" as important aspects of Greenwich that the town wishes to preserve. In a subsequent section, the plan states that "[t]he following considerations should be the starting point for decision-making . . . [t]he goal is to sustain a climate where . . . historic streetscapes can be preserved." These

specific references to streetscapes, the historical factor at issue in this case, define one aspect of "historical factors" and certainly apprised the plaintiffs that this would be a consideration in their subdivision application.

The consideration of historical factors does not occur in a vacuum. See *Bombero* v. *Planning & Zoning Commission*, supra. "It is unrealistic to demand detailed standards which are impracticable or impossible." *Forest Construction Co.* v. *Planning & Zoning Commission*, supra, 679. The term historic factors derives meaning from the physical environment of the historic district. See *A-S-P Associates* v. *Raleigh*, 298 N.C. 207, 223, 258 S.E.2d 444 (1979). In the context of a historic district, there are identifiable and sufficiently distinct historical standards by which the commission may be guided. These same characteristics also put property owners on notice of the types of historical factors that will be considered. "Although . . . discretion cannot be entirely eliminated because of the subjective nature of this process"; *Bellevue Shopping Center Associates* v. *Chase*, 574 A.2d 760, 764 (R.I. 1990); the board is confined to the relevant historic period in its consideration of historical factors.

Accordingly, we conclude that the standards set forth in the regulations and the plan are reasonably precise and sufficient to guide the commission. Accord *Maher* v. *New Orleans*, 516 F.2d 1051, 1067 (5th Cir. 1975), cert. denied, 426 U.S. 905, 96 S. Ct. 2225, 48 L. Ed. 2d 830 (1976); *Bellevue Shopping Center Associates* v. *Chase*, supra, 764–65; see generally *Burnham* v. *Planning & Zoning Commission*, 189 Conn. 261, 263–64, 455 A.2d 339 (1983); *Figarsky* v. *Historic District Commission*, supra, 207–209 (implicitly endorsing the adequacy of "historical factors" to guide municipal agencies and applicants); see also *Carlson* v. *Fisher*, 18 Conn. App. 488, 506–507, 558 A.2d 1029 (1989)

(referencing streetscape).[14] The Appellate Court was, therefore, incorrect in concluding that the regulations did not support the action taken by the commission.

III

The defendants also challenge the Appellate Court's conclusion that "it is the duty of the historic district commission, not the planning and zoning commission or the board of appeals, to decide whether a building should be erected in a historic district." *Smith* v. *Zoning Board of Appeals*, 29 Conn. App. 28, 35, 614 A.2d 464 (1992). We disagree with the Appellate Court because we conclude that the historic district commission does not exercise exclusive statutory jurisdiction to rule on changes affecting the historic character of a historic district.

The historic district commission and the planning and zoning commission perform different yet sometimes overlapping functions. The historic district commission is authorized to make its own independent determination of whether a proposed building or alteration is consistent with the historic district. General Statutes § 7-147f. "Absent a statutory provision designating which commission is to have overriding responsibility, [however,] the fact that the legislature has given responsibility to more than one agency suggests that each must exercise its own authority, using its standards and procedures, regardless of what the other agencies do under their delegation of power from the state." T. Tondro, supra, p. 50. The General Statutes do not confer exclusive powers on the historic district commission. To the contrary, General Statutes

[14] The plaintiffs also argue that they have been deprived of their due process rights because the phrases historical factors and historic streetscape did not provide sufficient notice as to whether they could subdivide and build on their property. Our conclusion that "historical factors" and "historic streetscape" are reasonably precise terms, thereby putting the plaintiffs on adequate notice, disposes of this argument.

§ 7-147c (j) authorizes the historic district commission to cooperate with other regulatory agencies interested in preservation and to initiate planning and zoning proposals on their behalf. Moreover, we have recognized concurrent agency jurisdiction in other areas. See, e.g., *Wright* v. *Woodridge Lake Sewer District*, 218 Conn. 144, 147–48, 588 A.2d 176 (1991) (sewer and zoning agencies); *Mario* v. *Fairfield*, 217 Conn. 164, 169–70, 585 A.2d 87 (1991) (department of environmental protection and inland wetlands commission).

Accordingly, we conclude that the historic district commission's authorization to consider historical factors does not foreclose the commission from considering historical factors. The Appellate Court was mistaken in ruling to the contrary.

IV

The defendants next argue that the Appellate Court incorrectly concluded that the board's consideration of the subdivision regulations improperly encroached upon the applicable zoning regulations. The plaintiffs claim, to the contrary, that because it is undisputed that the application conformed with the zoning requirements of an R-7 zone, it could not be denied on the basis of nonconformance with subdivision regulations. *Smith* v. *Zoning Board of Appeals*, supra, 37. We agree with the defendants.

Citing *Cristofaro* v. *Burlington*, 217 Conn. 103, 107, 584 A.2d 1168 (1991), the Appellate Court concluded that the commission lacked the authority "to include historical factors in its regulations" because "[s]ubdivision regulations cannot impose minimum lot size, shape, width and depth requirements greater than those required under the zoning regulations for the zone where the property is to be subdivided or deny approval of lots that meet all zoning requirements." *Smith* v. *Zoning Board of Appeals*, supra, 36. *Cristofaro*, how-

ever, is inapposite. In *Cristofaro*, the planning and zoning commission enacted a regulation that directly intruded on a subject that was exclusively a zoning matter. See *Avonside, Inc.* v. *Zoning & Planning Commission*, 153 Conn. 232, 238–39, 215 A.2d 409 (1965) (fees in subdivision regulations in excess of fees in zoning regulations invalid). A subdivision regulation may not conflict with applicable zoning regulations.[15]

Although subdivision regulations and zoning regulations have separate functions, landowners must comply with the requirements of each applicable regulation. *Vose* v. *Planning & Zoning Commission*, 171 Conn. 480, 483, 370 A.2d 1026 (1976); see *Cristofaro* v. *Burlington*, supra, 106; *Sheridan* v. *Planning Board*, 159 Conn. 1, 9, 266 A.2d 396 (1969). Only if the commission enacts subdivision regulations that exclusively concern zoning power, or if the subdivision regulations directly conflict with a zoning power, will the subdivision regulation be invalid. *Cristofaro* v. *Burlington*, supra, 107; *Avonside, Inc.* v. *Zoning & Planning Commission*, supra.

In this case, the subdivision regulations neither encroach upon an area that is uniquely a zoning power, nor directly conflict with applicable zoning regulations. As we discussed above, § 101 (d) of the charter permits the commission to enact regulations that consider historical factors. Although General Statutes § 8-2[16] authorized the zoning commission to enact zoning regulations that consider historical factors, the parties have

[15] General Statutes § 8-26 provides in pertinent part: "The commission shall have the authority to determine whether the existing division of any land constitutes a subdivision or resubdivision under the provisions of this chapter, provided nothing in this section shall be deemed to authorize the commission to approve any such subdivision or resubdivision which conflicts with applicable zoning regulations." See *Ferndale Dairy, Inc.* v. *Zoning Commission*, 148 Conn. 172, 176, 169 A.2d 268 (1961).

[16] General Statutes § 8-2 provides in pertinent part: "Zoning regulations may be made with reasonable consideration for the protection of historic factors . . . ."

not pointed to any zoning regulation that does so. The record therefore does not indicate any conflict between the pertinent subdivision regulations and any of the applicable zoning regulations.

Accordingly, the zoning regulations in this case do not prevent the board's review of historical factors in considering whether to grant or deny the plaintiffs' subdivision application. The Appellate Court was mistaken in relying on a conceived conflict of regulations as a ground for sustaining the plaintiffs' appeal.

V

Last, the plaintiffs argue, as an alternate ground for affirming the judgment of the Appellate Court, that the denial of their subdivision application results in an unconstitutional taking of their property without just compensation. Because the plaintiffs have not met their burden of proving that there are no viable options for the property, we conclude that this claim cannot be sustained.

The plaintiffs claim that the board's denial of their subdivision application was a practical confiscation of their land and that they have no viable alternatives. The board rejected the plaintiffs' contention, concluding that other alternatives for development of their land exist and that the plaintiffs therefore had not been deprived of their due process rights. Although the trial court acknowledged that the plaintiffs had advanced this argument, it did not resolve it and the plaintiffs did not ask the trial court to articulate its reasons for failing to do so.

The plaintiffs have the burden of proving that they have been finally deprived by the board of the use of their property. *Gil* v. *Inland Wetlands & Watercourses Agency*, 219 Conn. 404, 415, 593 A.2d 1368 (1991); *Bom-*

bero v. *Planning & Zoning Commission*, supra, 746; *Brecciaroli* v. *Commissioner of Environmental Protection*, 168 Conn. 349, 357, 362 A.2d 948 (1975). We have held that a final deprivation has occurred when there were no economically viable uses of the land; *Dooley* v. *Town Plan & Zoning Commission*, 151 Conn. 304, 311, 197 A.2d 770 (1964); see *Gil* v. *Inland Wetlands & Watercourses Agency*, supra; or there has been a practicable confiscation of the entire property.

In this case, the board found, as a matter of fact, that other viable options exist for the development of the plaintiffs' property. The board's rejection of the plaintiffs' subdivision application does not lead to the conclusion that other plans will be denied as well and the trial court has made no relevant findings to the contrary. " '[u]ntil it appears that the plaintiff[s] [have] been finally deprived . . . of the reasonable and proper use of the property, it cannot be said that there has been an unconstitutional taking of property without just compensation.' " *Luf* v. *Southbury*, 188 Conn. 336, 351–52, 449 A.2d 1001 (1982).[17] Consequently, we cannot conclude that there has been a taking. *Gil* v. *Inland Wetlands & Watercourses Agency*, supra; *Luf* v. *Southbury*, supra, 354; *Brecciaroli* v. *Commissioner of Environmental Protection*, supra, 358.[18]

[17] The plaintiffs refer to testimony by the board commissioner concerning the option of building condominiums on the property. On the basis of the commissioner's speculation that the historic district commission would not grant a certificate of appropriateness, the commissioner suggested that this option was not worth discussing. Contrary to the plaintiffs' contention, this testimony does not establish that the board believes that there are no viable alternatives.

[18] The plaintiffs also claim that the subdivision regulations have been unequally applied to them and throughout the historic district. The plaintiffs, however, only peripherally raised this claim before the board and never corroborated it with evidence. Because the record is insufficient, we decline to review this claim.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the trial court's judgment dismissing the plaintiffs' appeal.

In this opinion the other justices concurred.